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CITATIONS

Case:

Federal Trade Commission v. *Standard Education Society*, 302 U. S. 112 6

Statute:

Federal Trade Commission Act, Sec. 5, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. sec. 45 .. 2

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 304

PHIL HOWE, DAVID A. HOWE AND JOANNE B. HOWE, COPARTNERS TRADING AS HOWE AND COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 439) is reported in 148 F. 2d 561.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on April 4, 1945, and rehearing was denied on May 7, 1945 (R. 442–4, 445). The petition for a writ of certiorari was filed on August 7, 1945. The jurisdiction of this Court is invoked

under Section 5 of the Federal Trade Commission Act as amended, c. 49, 52 Stat. 111, 15 U. S. C. 45, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether a distributor of products more than half of which, on a value basis, are made in Hollywood, California, may apply the designation "Hollywood" to products not made there notwithstanding that the designation when applied to these products tends to deceive purchasers.

(2) Whether there is substantial evidence to support the Commission's finding that petitioners' use of the name "Hollywood" to describe cosmetics made in other cities was misleading to purchasers.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111, 15 U. S. C. sec. 45, provides in part:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

In a proceeding under Section 5 of the Federal Trade Commission Act, the Commission charged petitioners with using unfair and deceptive practices in commerce (R. 7). After a hearing the Commission made the following findings:

Petitioners, trading as copartners under the name Howe & Company, with their principal place of business in Seattle, Washington, sell and distribute various cosmetics in interstate commerce (R. 19–20). One of their principal brands is designated as "Howe's Hollywood" cosmetics, and the word "Hollywood" is featured both in petitioners' advertising of these preparations and in the labels used for the various items, as: "Howe's Hollywood Creme Nocturne," "Howe's Hollywood Finishing Cream." In connection with the brand name there frequently appears also the legend, "favorite of the stars." In smaller type at the bottom of the label appears also the words, "Howe Company, Seattle, Distributors." (R. 22–23.)

Petitioners do not manufacture any of their products, but purchase them in bulk from cosmetic manufacturers located in various cities, including Seattle, Washington; Newark, New Jersey; Hollywood, California; and New York City. Although twenty items are sold under the name "Hollywood" only three of these are obtained from sources in Hollywood. During the first six

months of 1942 the amount paid for these three items was 52.9% of the total amount paid by petitioners for cosmetics sold by them under the name "Hollywood." (R. 24.)

A substantial portion of the purchasing public associates the word "Hollywood," when used to designate cosmetics, with the motion picture industry; understands that cosmetics so designated were manufactured in Hollywood, California; and has a preference for cosmetics having their origin in Hollywood over those manufactured elsewhere (R. 24–25). Petitioners' use of the word "Hollywood" to designate their products which are not manufactured in Hollywood, California, tends to mislead and deceive purchasers as to the properties and origin of these products (R. 26).

On the basis of these and other findings, the Commission entered an order directing petitioners to cease and desist from using the word "Hollywood" to designate any cosmetic preparation sold by them which is not in fact manufactured in Hollywood, California (R. 28).[1]

ARGUMENT

Petitioners contend (Br. 9–11) that because 52.9% of the cosmetics which they sell under the designation "Hollywood" is actually manufactured in Hollywood, California, they were justi-

[1] The order contains a number of other prohibitions, but no issue as to them is raised by the petition for writ of certiorari.

fied in using the word "Hollywood" to designate any or all of their products. But the fact that three of petitioners' 20 products may properly be designated as "Hollywood" cosmetics does not alter the misconception growing out of sale under this designation of the other 17 products which are not manufactured in Hollywood. A seller must tell the truth about each of his products.

Petitioners also contend (Br. 12–26) that there was no evidence to support the Commission's finding that the use of the word "Hollywood" to describe cosmetics manufactured in other cities produced a false impression in the minds of the purchasing public. In answer to the contention, we call attention to the substantial evidence supporting this finding.

A woman who had been engaged in the cosmetic business for more than twenty years and who was in charge of the cosmetic business of a Seattle department store testified, on the basis of her contact with the purchasing public, that "the type of people who read the movie magazine * * * the more gullible type" think the word "Hollywood" connects a cosmetic preparation with Hollywood, California, and that petitioners' label would give the impression that their product was manufactured in Hollywood (R. 251–4).

Like testimony was given by an assistant buyer in a department store and a user of cosmetics (R. 260–1, 263), by a representative in the northwest of an eastern cosmetic company (R. 265–6),

by the owner of a beauty shop who sold cosmetics at retail (R. 273, 275, 276), by the advertising manager of a concern distributing cosmetics (R. 302, 304), by a cosmetics manufacturer with thirty years' experience in that field (R. 314, 317), and by other qualified witnesses (R. 333, 341, 356). A manufacturer of cosmetics testified that purchasers and dealers in cosmetics associated the name "Hollywood" with "the expert make-up which was being manufactured there for the movie industry" (R. 339).

That there was some conflicting evidence is immaterial. The courts cannot pick and choose bits of evidence to make findings of fact contrary to those of the Commission. *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112, 117.

CONCLUSION

The decision below is clearly correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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